

REPLY TO:

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March 17, 2017

**Via Email**

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NAVSUP FLC Jacksonville  
110 Yorktown Ave., Bldg. 100, 3<sup>rd</sup> Floor  
Jacksonville, FL 32213-0097

**Re: Protest of Munilla Construction Management, LLC  
of Cardinal Change to Contract No. N68836-17-C-0001  
Port Operations at Guantanamo Bay Naval Station, Guantanamo Bay, Cuba**

Dear Mr. Nelson and Ms. Florence:

Pursuant to Navy FAR Supp. §5233.103, MCM requests an independent review of this protest at a level above the Contracting Officer. This letter contains confidential and proprietary information of Munilla Construction Management, LLC ("MCM") which we respectfully request not be released to third parties absent a protective order or agreement and/or the express written consent of the undersigned. MCM hereby protests the cardinal change to the above-captioned contract in which the transition period to start performance was expanded from 30 days to 150 days without competition by all offers for the underlying procurement. This cardinal change demonstrates that only MCM was able to satisfy the transition requirements of the underlying solicitation since the awardee failed to perform the contract at the conclusion of the transition period and only MCM was able to perform.

The awardee's proposal should never have been considered for award since its transition plan was unacceptable as demonstrated by its failure to perform and the Solicitation required the rejection of a proposal from evaluation if its transition plan was unacceptable. MCM requests award of the contract under RFP N68836-16-R-0003 or, in the alternative, resolicitation of this requirement with the transition period actually required by the Navy. Resolicitation of the requirement (not contract) is requested since MCM would strongly suggest that a Best Value procurement be used to prevent unrealistically low pricing and properly evaluate technical capabilities.

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Attached at Exhibit No. 1 is a heavily redacted copy of a cure notice that MCM has received as well as a contract modification for MCM to continue the port operations through the end of May. Exhibit Nos. 5 and 6. Since the transition period for the contract awarded under the solicitation started on January 1, 2017, turnover of the port operations under the above-captioned contract on June 1, 2017 would mark a transition period of 150 days. MCM understands that even for this delayed transition, that additional contract requirements are being relaxed to assist the incumbent contractor to start performance on June 1, 2017. MCM recently learned of this extended transition period by hearing of recent continued efforts of Seaward to improperly poach MCM employees. Had all the offerors been allowed to compete for the contract based upon a 150 day transition period, the pricing would have been materially different as well as the technical proposals thereby enabling MCM to be evaluated as the successful awardee. It is clear under the original solicitation, that none of the proposals (except MCM as the incumbent) offered a viable transition plan and each proposal should have been rejected. The Solicitation required a satisfactory Transition Plan and failure to provide a satisfactory plan required rejection of the proposal and exclusion from consideration for award.

Please address all correspondence relating to the protest to the undersigned as the representative of MCM. MCM also requests a copy of the following documents pursuant to any bid protest rules of the Department of Navy and/or the Freedom of Information Act:

1. All emails and correspondence regarding the transition of Contract No. N68836-17-C-0001 as well as the performance of that contract to include all modifications to the Contract;
2. Any correspondence or communications relating to the modification issued to MCM to continue performance;
3. Any documents relating to the initial performance by the contractor which resulted in the cure notice to include any reports or assessments of performance;
4. Any emails, submissions or other communications between Seaward, its representatives or advocates and the Navy; and
5. Any other documents germane to the consideration and/or resolution of this protest.

## **BACKGROUND**

### **FACTS**

The Guantanamo Bay Naval Station is the only American military facility located in a hostile communist country. The Naval Station is bisected by the Bay which extends beyond the Bay inland into communist Cuba. Therefore, the Port not only provides access for the Base to

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the United States but also serves to connect the two sides of the Naval Station. Port operations are critical to the Base's mission. MCM and its predecessor company, Burns and Roe, have successfully provided the port operations services at Guantanamo Bay Naval Station under contract with the Department of the Navy since 1999. In 2016 alone, MCM Guantanamo Port Operations conducted 220 ship movements, moved more than 182,000 passengers and 28,000 vehicles on its two ferries, conducted 111 Harbor pilot operations, 61 medical evacuations, and 11 detainee movement operations totaling more than 15,000 operating hours.

MCM has consistently received performance review ratings of very good to exceptional from Navy personnel for MCM's work at Naval Station Guantanamo, and MCM personnel have received letters of appreciation from Navy personnel for the services of MCM's personnel at Naval Station Guantanamo.

To satisfy the Navy's requirements and needs, MCM (and its predecessor) carefully recruited, vetted, trained, developed, and retained a workforce of over 70 employees to perform the Port Operations. Many of these employees are Foreign Nationals as well as American citizens. All have the required clearances and other approvals necessary to work on the Base. Assembling this work force over the years has been quite costly to MCM and its predecessor thereby mandating that they protect their significant investment by executing lucrative employment agreements assuring the continued loyalty and employment of the employees for work on this Project as well as other Contracts that MCM is performing on the Base. All the Offerors knew or should have known of MCM's employment contracts and the restrictions in the Agreements whereby MCM would use its workforce on its other projects on the Base if it was not operating the port.

The Navy (Southeast Regional Maintenance Center (SERMC)) initially issued Solicitation No. N40027-15-R-0001 on November 7, 2014 for the continued performance of the Guantanamo Naval Station port operation services. The joint venture of MCM and Burns and Roe submitted an offer in response to that solicitation. At the conclusion of the competition, the MCM-Burns and Roe Joint Venture filed a protest with the Government Accountability Office ("GAO") dated March 27, 2015 alleging that the Navy had improperly evaluated the proposals by erroneously evaluating the price as well as inflating technical ratings to eliminate distinctions and differences in the merits of the various offers submitted in response to the solicitation. That solicitation had been advertised as a best value competition. MCM received a debriefing from the Navy after which the Navy requested the joint venture to provide the number of hours, number of employees and pricing included in the proposal. (b) (4)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Apparently, based upon this and other pricing discrepancies demonstrating the unrealistic pricing, the Navy cancelled the solicitation and resolicited proposals.

On June 8, 2016, the Navy issued RFP N68836-16-R-0003 for the Project with work scheduled to begin in late 2016. The RFP called for award to the lowest priced technically

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acceptable proposal. The Navy obtained and used staffing and cost information of MCM in developing the RFP. MCM received e-mail notice on October 27, 2016 that the Navy had awarded the contract for the Project that day to Seaward Services, Inc. (“Seaward”).

The solicitation and the awarded contract required that the selected awardee would have 30 days to transition the contract to their workforce whereupon the awardee would start performing the work. See Modification P00001 to Contract No. N68836-17-C-0001 attached at Exhibit No. 3. The pricing schedule was broken down into various line items to include separate pricing for the transition period. See Exhibit No. 4, Contract No. N68836-17-C-0001, p. 12 at CLIN 0016 (“30 Day Transition”; Exhibit 4 is hereinafter referred to as the “Contract”). The awardee proposed a price of \$47,980.00 for the transition work. The transition was a critical requirement of the contract. While the award was based on the lowest reasonable price, an Offeror would not be considered if it submitted a technical proposal that was rated as “unacceptable” for any sub-factor.<sup>1</sup> The second sub-factor related to the Transition Plan:

**Sub-factor Two: Transition Plan:** The Offeror shall develop a transition plan detailing the transition process in accordance with Section C 5.0 of the PWS establishing a fully operational organization by the full performance period start date. An acceptable Transition Plan must demonstrate all phases of contract implementation and key events from the time of contract award until the performance start date. The Offeror shall comply with all applicable DoD security regulations and procedures during the performance of this contract. The proposal shall include Offeror’s cognizant security office information (Name, Address and Zip Code).

See Solicitation No. N68836-16-R-0003 at p. 14. The solicitation also required the successful offeror to submit a staffing plan to include “a comprehensive and detailed approach to staffing the contract.” *Id.* The solicitation clearly required at Technical Exhibit No. 9 that poaching or recruiting another Contractor’s employees “shall not be permitted”. The Offerors were alerted to employee housing requirements that were required to be arranged long before the start of performance. The solicitation required that the “Contractor assumes responsibility for 100% of contract performance” upon the conclusion of the transition. Solicitation, p. 21 at ¶C5.3.

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<sup>1</sup> Page 13 of the solicitation provided as follows [emphasis in original]: “**Note: If the Offeror receives an unacceptable rating in any one factor and/or sub-factor, they will be considered overall “Unacceptable” and will not be considered for award.**” The solicitation also defined acceptable/unacceptable on the same page as follows:

Technical Acceptable/Unacceptable Ratings

Rating	Description
Acceptable	Proposal clearly meets the minimum requirements of the solicitation.
Unacceptable	Proposal does not clearly meet the minimum requirements of the solicitation.

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The solicitation required the Contractor to submit to the Navy 30 days prior to the start of the contract, the number of persons that it planned to employ to perform the work. Solicitation, p. 40, ¶C23.3.5.1. For each worker, the Contractor was required to apply for an entry clearance approval to the Base Commander “in accordance with the Foreign Clearance Guide” and “All requests shall be initiated NO LATER THAN 60 DAYS PRIOR TO REQUIRED ENTRY”. Id. at ¶C23.4.1.

The Specifications required the Awardee to perform all the work after a 30 day transition period (which Modification P00001 reset at January 1 -31, 2017 with “full performance” required to start on February 1, 2017; the provision below has been modified to include the Modification P00001 changed dates):

#### **C 5.0 TRANSITION**

C 5.1 The Contractor shall complete all training and familiarization in order to support the below timelines. The Contractor shall develop a transition plan detailing the transition process, including but not limited to hiring, Subcontractor arrangements, training and qualifications, obtaining vehicles, weight handling equipment, manlifts, turnover of GFE, island clearances, and housing accommodations, etc. The Government may accelerate the transition schedule given below under the Changes clause at a rate to be negotiated.

C 5.2 Anticipated Contract Award: 3 October 2016

C 5.3 To ensure the continuity of services are maintained at the required level of proficiency, the Contractor shall provide a transition period from 1-31 January 2017 with the incumbent. The incoming Contractor shall work with the incumbent to prepare to assume full responsibility for all areas of operations and maintenance. Although the incoming Contractor and the incumbent will work together during the transition period, the incumbent will retain full responsibility during this transition time period. The Contractor assumes responsibility for 100% of contract performance on 1 February 2017. All transition activities must be completed prior to start date of this contract. The Contractor shall provide a Firm Fixed-Price for phase-in services. The full performance period will commence on 01 February 2017, with the transition period scheduled to commence on 01 January 2017. The transition schedule will be mutually agreed to by the Contracting Officer, Contracting Officer Representative (COR) and the Contractor to make best use of the capabilities and skills of the Contractor personnel.

See RFP at pp. 20-21 and Contract at p.55. The Performance Work Statement requirements were incorporated from the RFP into the Contract and are generally designated with the letter “C” before the paragraph or section number. Originally, the transition period was scheduled to start on November 1, 2016, so the awardee received a 61 day extension to the start of the transition period after the Navy awarded the contract in late October 2016 with MCM receiving Notice of Seaward’s Award on October 27, 2016.

MCM thereafter protested to the Government Accountability Office and the Court of Federal Claims alleging, among other claims, that Seaward’s price was unreasonably low thereby demonstrating a fundamental misunderstanding of the solicitation requirements. The Navy

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refused to perform a price realism analysis and instead only compared the offerors' pricing to select Seaward as the low offeror. In Court the Government strenuously argued that it was in the Navy's and the public's interest for Seaward to start performance on February 1, 2017. The Government doggedly argued that the awardee's performance must start on February 1, 2017 and that its interests required nothing less. The Court deferred to the Navy that its price analysis was reasonable and refused to disturb the award or enjoin the start of full performance of the Contract on February 1, 2017. MCM warned the Navy that Seaward was not ready to start "full performance" by email on January 31, 2017 as Seaward apparently had not recruited, trained and transported its work force to the Base as required by the solicitation and the Contract. Exhibit No. 7.

### **SEAWARD'S TRANSITION FAILED MISERABLY**

Despite having the month of November, December, and January, at 12:00 AM midnight 1 February 2017, the official date of turnover/transition, Seaward only produced 6 people to start work. The resulting chaos was inevitable. The same day, the Guantanamo base supply ship had no tug and Pilot service because of Seaward's failure, and the ship was forced to circle at Sea for 6 hours until it motored in under its own power without Tug or Pilot assistance. Additionally, the base fuel Tanker could not depart until the Navy itself provided line handlers to cast the ship off the dock. Seaward's response to its performance failure was to threaten MCM with a lawsuit for not allowing Seaward to poach MCM's employees. Exhibit No. 8. Seaward's angry threatening email is a stark admission that it never intended to recruit, vet, train, process for required approvals and transport the work force required by both the Solicitation and Seaward's contract. Seaward clearly relied upon poaching MCM's employees and equipment to start work despite the solicitation provisions requiring Seaward to provide its own labor force.

### **MCM SUCCESSFULLY RESTARTED AND PERFORMED**

MCM was ordered by the Port Operations Commander and Contracting Officer within hours of Seaward's failed startup to return and resume operating for an additional 28 days to remedy Seaward's failure. Thankfully, MCM stepped in within hours of Seaward's failure, and as a result, successfully handled the next day an emergency medical evacuation, transporting an ambulance and patient across Guantanamo Bay with MCM's captains and support personnel manning the mission. MCM continues to successfully perform to this day.

On February 1, 2017, MCM was originally extended for 28 days to cure Seaward's default. Exhibit No. 5. That extension has been extended through the end of May, 2017. Exhibit No. 6. Seaward was issued a CURE Notice confirming Seaward's default. MCM believed that Seaward's contract was being terminated since MCM's 120 day contract extension would far exceed any reasonable CURE period which typically lasts 10 days or less for contracts far less critical than the Port Operations contract. See, e.g., FAR §52.249-8 (Seaward's Contract

is a Commercial Items contract that does not contain a requirement for the Navy to issue a Cure Notice prior to termination).

MCM has learned this week that Seaward is continuing its efforts to recruit MCM's employees through a labor hiring service in derogation of MCM's employment contracts thereby indicating to MCM that the Navy is providing Seaward a transition period of 150 days or more. The consequence of this extension is that MCM could have bid a much lower price if it knew that the Base Period of the Contract would not start until June 1, 2017 or later (MCM's Base Year pricing and transition pricing were both lower than Seaward's pricing). Furthermore, had all the offerors been required to price the contract according to a 5 month transition period or longer, MCM's pricing would have compared more favorably since it bid "no cost" for the transition as the incumbent whereas Seaward priced a 30 day transition at \$47,980.00. More importantly, however, under the original terms of the solicitation, the Navy would not even have considered Seaward's pricing had the Navy known that Seaward had no ability to meet the 30 day transition requirement and start full operations immediately thereafter. Under the solicitation evaluation criteria, Seaward could not have shown that it "clearly meets the minimum requirements of the solicitation". Apparently the strategy was to lowball the pricing, steal MCM's employees and equipment and force the Navy to relax the contract requirements to reduce costs.

### **BASIS OF PROTEST AND ARGUMENT**

Seaward's Transition period ended on January 31, 2017. It was required to start "full performance" on February 1, 2017. Seaward failed to perform on February 1, 2017 and MCM was required to commence "full performance" of the Port Operations on February 1, 2017 through the end of May, 2017. The solicitation clearly required that a proposal failing to offer to start full performance immediately upon the conclusion of a 30 day transition period would not be evaluated and rejected. 30 days was not a goal. It was a mandatory requirement. The Navy's change to allow Seaward to start full performance on June 1, 2017 or thereafter is a change outside the scope of the competition which requires the Navy to resolicit this requirement.

"In determining whether a modification falls within CICA's competition requirement, this court examines whether the contract, as modified materially departs from the scope of the original procurement."<sup>2</sup> AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993). In determining whether a modification to a contract is within the scope of the original competition, the Court considered the differences between the original solicitation and the contract as changed and whether the change was one in which offerors could reasonably have anticipated the nature of such a change. Id. at pp. 1207-1208. "When a solicitation expressly prohibits certain types of modification, such a modification, when it occurs, is outside the scope of the solicitation and a new procurement is required by the CICA." Northrop Grumman Corp.

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<sup>2</sup> "CICA" is a reference to the competition in Contracting Act which requires full and open competition unless exempted by the statute

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v. U.S., 50 Fed.Cl. 443, 466 (2001) *citing* Avtron Mfg., Inc., B-229972, 88-1 CPD ¶458 (modification that allowed performance which was specifically prohibited by the solicitation is outside the scope of the contract and must be resolicited according to the changed requirements).

Had Seaward proposed a transition plan of 5 months, rather than the required 30 days, its proposal would have been rejected and its offer not further evaluated. The solicitation requirements were clear on this requirement as it only allowed the Navy to shorten the transition period and not to lengthen it. The Navy's change to the contract allowing Seaward to defer "full performance" for an additional four months so that it could be provided more time to improperly hire MCM's work force and realistically prepare for "full performance" is a change outside the scope of the contract which mandates resolicitation of this requirement especially since such a change would materially affect the technical proposals of the offerors and the prices quoted by them. The change destroyed the basis of competition as represented in the evaluation factors of the solicitation and the solicitation requirements.

To the extent that Seaward's transition was improperly evaluated or Seaward did not intend to perform according to what it proposed, the Navy should have rejected the Seaward proposal, terminate Seaward's contract and take corrective action by awarding to MCM. Seaward's threatening email sent on the day of its default shows that it never intended to provide a work force as required by the solicitation.

For all the reasons provided, MCM respectfully requests cancellation of the Seaward contract, award to MCM or, in the alternative, resolicitation of this requirement. If you should have any questions regarding this protest, please do not hesitate to contact the undersigned. Thank you for your consideration.

Respectfully submitted,

**SMITH, CURRIE & HANCOCK LLP**

A handwritten signature in blue ink, appearing to read 'Karl Dix, Jr.', with a stylized flourish at the end.

Karl Dix, Jr.  
Attorneys for Munilla Construction Management,  
LLC

KFD  
Enclosures

cc: Mr. Juan Perez  
Pedro Munilla, Esq.

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